Supreme Court, U.S.
FILED
APR 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 88-1376

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT L. MUSTO, *et al.*,
Petitioners,

vs.

AMERICAN GENERAL CORPORATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

PETITIONERS' REPLY BRIEF AND SUPPLEMENTAL BRIEF

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Petitioners (hereinafter referred to as "the Retirees") submit this Reply Brief and Supplemental Brief in light of this Court's recent decision in *Firestone Tire and Rubber Co. v. Bruch,* 109 S. Ct. 948 (1989), and in response to the arguments raised in Respondents' Brief in Opposition.

I. THIS COURT HAS RECENTLY RECOGNIZED THAT ERISA WAS NOT INTENDED TO STRIP RETIREES OF PREEXISTING CONTRACT RIGHTS.

On February 21, 1989, this Court issued its opinion in *Firestone Tire and Rubber Co. v. Bruch,* 109 S. Ct. 948 (1989).

This decision was not available to the Retirees before they filed their Petition, but was available to Respondents before they filed their Brief in Opposition. Understandably, Respondents chose not to mention the significance of the *Firestone* case.

Firestone, as does the *Musto* case, involved unfunded employee welfare benefit plans. The issue in *Firestone* was whether an ERISA[1] plan administrator's decision to deny benefits was subject to a *de novo* or an arbitrary and capricious standard of review. Although the lower courts had adopted the arbitrary and capricious standard, this Court held that the *de novo* standard was the correct standard of judicial review.

Initially, the Court observed that although ERISA is a "comprehensive and reticulated statute," it does not address all issues in interpreting plans. 109 S. Ct. at 953 (citation omitted). In reaching its decision, the Court relied upon the state of the law before the enactment of ERISA. This Court sought a decision that was "consistent with the judicial interpretation of employee benefit plans prior to the enactment of ERISA." 109 S. Ct. at 955. Respondents have criticized the Retirees for relying upon contract law in support of their claim. (Resp. Brief in Opposition, pp. 9-10.) Yet, in *Firestone* the Court acknowledged that "[a]ctions challenging an employer's denial of benefits before enactment of ERISA were governed by principles of contract law." 109 S. Ct. at 955. In *Firestone,* the employer argued for a position that would have resulted in "less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted." 109 S. Ct. at 956. The Court rejected this argument after reemphasizing that "ERISA was enacted 'to promote the interests of employees and their beneficiaries in employee benefit plans,' and 'to protect *contractually* defined benefits'." 109 S. Ct. at 955 (citations omitted, emphasis added).

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[1] The Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.*

The Retirees have sought review of this case to determine whether ERISA strips retirees of pre-ERISA rights concerning the interpretation of welfare benefit plans. In *Firestone,* this Court upheld the principle that ERISA was not designed to deprive beneficiaries of welfare benefits they enjoyed before ERISA. Yet this is exactly the position Respondents seek to impose upon the Retirees and every other retired person in this country who is covered by an employer-sponsored welfare benefit plan. Although Respondents disagreed with or mischaracterized nearly every assertion made in the Petition, Respondents did not deny that this Court has not previously provided guidance to the lower courts about how ERISA plans should be interpreted. (Petition, p. 9.) In *Firestone,* the principle that ERISA was not designed to afford less protection to welfare plan beneficiaries was limited to the issue of standard of review. The Court should grant review of the case at bar to extend this principle to the actual interpretation of plan documents. Otherwise, the standard of review mandated by this Court's *Firestone* decision will become a form without substance.

II. RESPONDENTS' BRIEF IN OPPOSITION MISCHARACTERIZED THE ISSUES PRESENTED FOR REVIEW.

In large part, Respondents use their Brief in Opposition to set up straw-man issues. Predictably, Respondents then do an excellent job of knocking down these straw men. Respondents, however, failed to address the issues raised in the Petition, issues that are of concern to thousands of retired persons and issues that this Court has suggested should be resolved in favor of the Retirees.

Respondents have claimed that the Retirees are seeking to have this case decided on the basis of state law. (Resp. Brief in Opposition, pp. 12-15.) There is no question that ERISA preempts state law control of employee benefit plans. Federal

common law must fill the void left by preemption. 109 U.S. 954. This federal common law should be based on the teachings of existing state law. *Massachusetts Mut. Life Ins. Co. v. Russell,* 473 U.S. 134, 157 (1985) (Brennan, J., concurring). Petitioners ask not that their case be decided on preempted state law, but that this Court determine what the federal substantive common law will be.

Contrary to Respondents' assertions, before the enactment of ERISA, the law was well settled that offers of post-retirement benefits could not be withdrawn after the employee had fully performed his end of the bargain by working until retirement. Every jurisdiction that considered the issue reached this conclusion. *E.g., Hoefel v. Atlas Tack Corp.,* 581 F.2d 1, 4-5 (1st Cir. 1978), *cert. denied,* 440 U.S. 913 (1979); *In re Erie Lackawanna Ry.,* 548 F.2d 621 (6th Cir. 1977).[2] Respondents cited not one pre-ERISA case contrary to this conclusion. Rather, Respondents have sought to distinguish this well-established body of pre-ERISA law on the grounds that most of these cases did not involve welfare benefits. There are certainly differences between medical and other benefits. These differences were well known to both the Retirees and the Respondents (or their predecessors in interest) at the time the Respondents accepted the many years of service the Retirees performed in reliance upon the offer of retiree medical insurance. The fact that retiree medical insurance is a less definite form of consideration than pension benefits was a risk that both parties accepted. The form of consideration does not alter the enforceability of the contract.

Respondents have suggested that "the courts are not free to impose vesting requirements on retiree medical plans." (Resp. Brief in Opposition, p. 10.) The Retirees agree with this state-

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[2] Because pre-ERISA case law was consistent across the country, this case is not, as Respondents have suggested, merely an inconsistency in Sixth Circuit decisions.

ment. The Retirees only want the courts to *enforce* a vesting requirement the parties imposed upon themselves. Respondents also cite a lengthy list of cases for the proposition that there is no "automatic vesting" of welfare plans under ERISA. The Retirees do not seek "automatic vesting." What they seek is an interpretation of the plan documents consistent with pre-ERISA law, which in this case would provide the Retirees with vested benefits.

Likewise, Respondents mischaracterize this action by stating that the Retirees seek to "veto" reductions and terminations of medical insurance. The Retirees no more seek to "veto" a change in the terms of their medical insurance than any party to a contract seeks to "veto" a breach of the contract.

Respondents have recast the issue in this case as whether the written plan document will be the primary determinant of the rights of the beneficiaries. (Resp. Brief in Opposition, p. i.) That simply is not the issue of this case. The issue is how should these written plan documents be interpreted. Before ERISA, the plan documents in question would have prohibited Respondents' reduction and termination of benefits for those persons who had retired. Congressional silence with respect to the vesting of welfare benefits cannot be interpreted as congressional disapproval of the vesting of welfare benefits. *In re White Farm Equipment Co.*, 788 F.2d 1186, 1192 (6th Cir. 1986). Additionally, the plan documents do not say that benefits can be reduced or terminated after an employee has retired.[3] Respondents' assertion that the Sixth Circuit made "factual findings" to this effect mischaracterizes both the role of the court of appeals and the nature of its conclusions. The

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[3] Although there were changes in the program from time to time, in over forty years there were never any changes that had a retroactive effect of changing the medical program for anyone after he or she had retired. The Retirees clearly stated this fact in their Petition and Respondents did not deny it.

court of appeals simply reviewed the written documents in question and drew legal conclusions as to how the documents should be interpreted.

Finally, Respondents stated that the Retirees did not raise before the court of appeals the issue of reasonable expectations under ERISA. This is entirely incorrect.[4] Respondents may have forgotten this portion of the Retirees' Sixth Circuit brief because the court of appeals did not address this substantial issue. Nor is the concept of reasonable expectations antithetical to ERISA. Indeed it has been relied upon in many ERISA cases. *E.g., Darden v. Nationwide Mut. Ins. Co.*, 796 F.2d 701, 706 (4th Cir. 1986) (employer who creates reasonable expectation of benefits must provide those benefits, particularly when the beneficiaries remained in the employer's service for many years); *Rettig v. Pension Benefit Guar. Corp.*, 744 F.2d 133, 153 (D.C. Cir. 1984) (employees with many years of employment with the employer have "reasonable expectation" of benefits); *A-T-O, Inc. v. Pension Benefit Guar. Corp.*, 634 F.2d 1013, 1020 (6th Cir. 1980) (ERISA should be interpreted so as to protect "employees' expectations"); *Pension Benefit Guar. Corp.*

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[4] In alleging that the Retirees "distort[ed] the record," (Resp. Brief in Opposition, p. 2, n. 5), the Respondents have done exactly that. Respondents' suggestion that they did not require medical insurance contributions in amounts greater than some of the Retirees' pensions (Resp. Brief in Opposition, p. 2, n. 5) is false. Emily Bottiggi, Respondents' own witness, clearly testified to this effect and there was no other evidence on this issue. Although Ms. Bottiggi's testimony is not part of the Appendix presently before the Court, it is a part of the record this Court would review if certiorari is granted. Moreover, although the district court could not tell at that time how many retirees had not enrolled in Respondents' reduced medical plan because the cost was prohibitive, the court indicated that there were some Retirees in this category. (App. B, A-46.) Also, the district court placed quotation marks around the word "chose" to indicate that the Retirees who did not have a pension large enough to pay for Respondents' medical program effectively had no choice but to decline Respondents' medical plan. (App. B, A-46.)

v. Heppenstall Co., 633 F.2d 293, 301 (3d Cir. 1980) (court considered "employee expectations" and allowed termination of plan where employees had no "justifiable expectation.") The doctrine of reasonable or justifiable expectations should be applied to this ERISA case of retiree medical benefits.

CONCLUSION

In *Firestone Tire and Rubber Co. v. Bruch,* this Court held that ERISA benefit plans should not be subjected to a standard of review that provided beneficiaries with less than they would have had before the enactment of ERISA. This Court should grant certiorari in this case to establish that ERISA benefit plans should not be interpreted to provide beneficiaries with less than they would have had before ERISA was enacted.

Respectfully submitted,

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